

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7298

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

DOCKET NO. 76-7298

B

JOHN L. GRADY & FATIMA GRADY,

Plaintiffs-Appellants

vs.

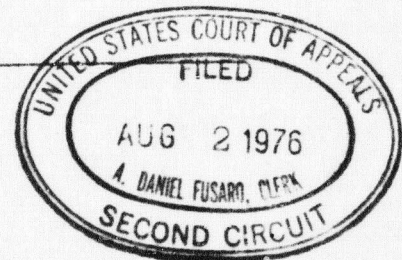
DR. RODERICK A. MCLEAN,

Defendant-Appellee

P/S

APPEAL FROM ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE,
RODERICK A. MCLEAN



MARTIN, GANOTIS, AMSLER & BROWN
Attorneys for Defendant-Appellee
Office and P.O. Address
499 S. Warren Street
Syracuse, New York 13202
(315) 472-6674

William F. Martin, Esq.
Of Counsel

George F. Mould
On the Brief

TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF ISSUES PRESENTED FOR REVIEW.....	1
STATEMENT OF THE CASE.....	2-5
POINT I - The District Court was correct in granting Appellee's motion to dismiss for lack of subject matter jurisdiction.....	6-10
CONCLUSION.....	11

TABLE OF CASES

PAGE

1. Shulthis v. McDougal, 32 S.Ct. 704,
225 U.S. 561, 56 L.Ed 1205 (1912).....6
2. Gully v. First National Bank in Meridian, 57
S.Ct. 96, 299 U.S. 109, 81 L.Ed. 70 (1936).....7
3. Phillips Petroleum Company v. Texaco, 415 U.S. 125,
94 S.Ct. 1002, 39 L.Ed. 29, 209 (1974).....8
4. State of New York v. White, 528 F.2d 336 (2nd Cr.
1975).....9
5. McFadden Express, Inc. v. Adley Corporation,
363 F2d. 546 (2nd Cir. 1966).....9

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Should this action have been dismissed for lack of subject matter jurisdiction?

The District Court answered this question by granting Defendant-Appellee McLean's motion to dismiss pursuant to Rule 12(b)(1) F.R.C.P.¹

¹ In their "Joint Notice of Appeal", Plaintiffs-Appellants state that they are appealing from the "final judgment entered in this action on the 13th day of May, 1976, and from the docketed entry of File No. 76 CV 58, filed at the United States District Court of New York Clerk's Office, Utica, New York, 13503." (Record). It is presumed from the above language that Plaintiffs-Appellants are appealing from the District Court's Order dated May 12, 1976, dismissing this action for lack of subject matter jurisdiction, (Record) which resulted in the entry of a judgment in behalf of Defendant-Appellee McLean on May 13, 1976 (Record). As a result, the brief of the Appellee herein is directed to the single issue which was determined by the aforesaid Order of May 12, 1976, as set forth above.

STATEMENT OF THE CASE

This appeal arises out of an action for alleged medical malpractice commenced by the filing of a complaint with the Clerk of the United States District Court for the Northern District of New York, and by service of a summons and complaint upon the Defendant-Appellee, Dr. Roderick A. McLean (hereinafter referred to as "Appellee"), on March 31, 1976.

On April 14, 1976, the attorneys for the Appellee served and filed a notice of appearance in behalf of the Appellee, together with a notice of motion and supporting affidavit to dismiss the action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) F.R.C.P. This motion was made returnable on May 10, 1976 at the Federal Building in Syracuse, New York. The aforesaid notice of appearance and copies of the notice of motion and affidavit were duly served upon the Plaintiffs-Appellants (hereinafter referred to as "Appellants") on April 14, 1976.

In the interim between the service and return date of the aforesaid motion to dismiss, several additional motions were² interposed in behalf of both the Appellants and the Appellee.

2

April 22, 1976 - Appellants filed notice of motion for "trial by jury with coercion of a remedy by a declaratory judgment for relief"; April 23, 1976 - Appellants filed amended notice of aforesaid motion; April 26, 1976 - Appellants filed note of issue; April 30, 1976 - Appellants filed notice of motion for default judgment; May 4, 1976 - Appellants filed notice of motion "to deny any special appearance of the opposing parties"; May 5, 1976 - Appellee filed motion to strike Appellants' note of issue; Appellee filed affidavit in opposition to Appellants' motion for default judgment; Appellants filed notice of motion "to strike defense's affidavit of motions"; May 7, 1976 - Appellee filed affidavit in opposition to Appellants' motion "to deny any special appearance of the opposing parties."

These additional motions dealt essentially with procedural matters and are not relevant to the central issue of the instant appeal, i.e. - the dismissal of this action for lack of subject matter jurisdiction.

On May 10, 1976, a hearing was held on the Appellee's motion to dismiss at the Federal Building in Syracuse, New York. After oral argument in behalf of the parties, the Court granted the Appellee's motion and ordered the action dismissed without prejudice for lack of subject matter jurisdiction (Record).

Since this ruling was entirely dispositive of the action, several other motions returnable at the same time were thereby rendered moot.

An order of dismissal dated May 12, 1976, (Record), was subsequently entered, and judgment in behalf of the Appellee was entered on May 13, 1976 (Record). At the conclusion of the above hearing, the Court recommended to the Appellants that a state court would be an appropriate forum for their action (Record).

The Appellants filed a "joint notice of appeal" from the aforesaid order and judgment on May 17, 1976 (Record).

The Appellants' complaint in the underlying action is divided into a "federal" cause of action (paragraphs 1-3, Record), and a "non-federal" cause of action (paragraphs 4 and 5, Record). Appellants allege in the "federal" portion of their complaint essentially that the Appellee was negligent in not following an unidentified regulation of the Food and Drug Administration

regarding the drug Provera (medroxyprogesterone Acetate) which allegedly provides that a "pap smear test should be included in the precautionary, pretreatment examination," (par. 2, Record

). They claim that the Appellee prescribed this drug for the Appellant Fatima Grady on the same day he took a test specimen of said Appellant's vagina and endocervix (par. 2, Record).

Appellants further allege that the District Court's jurisdiction of this portion of their action is founded upon the existence of a federal question and the amount in controversy, and that the "action arises under the Act of Food and Drug" (Record).

The remainder, or "non-federal" portion of the complaint is devoted to general allegations of negligence on the part of the Appellee during his entire course of treatment of the Appellant Fatima Grady for an alleged infection of the reproductive organs (paragraphs 4 and 5, Record).

In the affidavit in support of the Appellee's motion to dismiss (Record), the attorneys for the Appellee asserted that the District Court was without jurisdiction over the subject matter of this action inasmuch as there was no federal question jurisdiction under 28 U.S.C. Section 1331(a); no diversity jurisdiction under 28 U.S.C. Section 1332; and, upon information and belief, no specific federal statute which would provide Appellants with a federal cause of action in this instance (Record).

In support of their contention of a lack of federal question jurisdiction, Appellee's attorneys submitted that while the

Food and Drug Administration of the Department of Health, Education and Welfare had promulgated rules and regulations regarding the sale of certain drugs and specifying labeling and brochure requirements for said sale, such regulatory efforts were directed at persons engaged in the manufacture and distribution of drugs; and were not directed at, nor did they attempt to control or regulate, the actions of physicians in prescribing such drugs (Record).

As a result, it was further asserted that proof of the alleged malpractice of the Appellee would neither depend upon nor be determined by the construction of any F.D.A. regulation, and therefore, this action did not "arise under the Constitution, Laws, or Treaties of the United States," (Record).

POINT I

The District Court was correct in granting Appellee's motion to dismiss for lack of subject matter jurisdiction.

Both the Appellants and the Appellee in this action reside in the County of Onondaga, State of New York. No diversity of citizenship jurisdiction under 28 U.S.C. Section 1332 exists.

It is further submitted that there is no federal act or statute which would specifically provide the Appellants herein with a federal cause of action in this instance.

As a result, the District Court's jurisdiction over the subject matter of the instant action must necessarily depend upon the existence of a federal question under 28 U.S.C. Section 1331(a).

28 U.S.C. Section 1331(a) provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interests and costs, and arises under the Constitution, laws or treaties of the United States,"

The key phrase in determining the scope of this jurisdictional grant is "arises under" - a phrase which has received considerable construction in the federal courts.

The United States Supreme Court has addressed itself to the "arising under" test on several occasions. In Shulthis v. McDougal, 32 S.Ct. 704, 225 U.S. 561, 56 L.Ed. 1205 (1912), the

Supreme Court held that a suit does not necessarily "arise under" the laws of the United States unless it

"really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." Id. at 706; 569.

Recognizing the necessity of applying a more definite limitation to the "arising under" test, the Supreme Court subsequently held in Gully v. First National Bank in Meridian, 57 S.Ct. 96, 299 U.S. 109, 81 L.Ed. 70 (1936) that:

"To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. (citations omitted)
The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." Id. at 299 U.S. 112.

Applying these tests to the facts of the instant case, it is clear that the requisite elements of federal question jurisdiction have not been met.

The F.D.A. regulation regarding the drug Provera cited in Appellants' complaint sets forth certain labeling and brochure requirements for the sale of Provera. These requirements are directed exclusively at the manufacturers and distributors of this drug. Although the required labelling includes recommendations to the treating physician, the function of this regulation is to insure that the drug is properly labelled prior to sale. Any recommendations included in the wording of the label are not binding upon

treating physicians.

As a result, a determination of whether the Appellee herein did or did not commit medical malpractice cannot depend upon the construction of such a regulation.

It is therefore submitted that the District Court's jurisdiction of this action cannot be founded upon the federal question basis of 28 U.S.C. Section 1331(a). If an opposite conclusion were reached, the United States District Courts would have jurisdiction over virtually every medical malpractice action in which a physician/defendant prescribed a drug whose sale was subject to F.D.A. regulation; and the Food and Drug Administration would have a direct hand in defining the legal concept of medical malpractice by a private, state-licensed physician.

In construing the "arising under" test, federal courts have consistently looked beyond the wording of the complaint to the gravamen of the action.

In Phillips Petroleum Company v. Texaco, 415 U.S.125, 94 S.Ct. 1002, 39 L.Ed. 29, 209 (1974), Texaco had brought a federal action to recover the reasonable value of helium contained in processed gas sold to pipeline companies, on the basis of a recent amendment in federal law which purportedly reserved that right to them. The Supreme Court held that no federal question jurisdiction existed, finding that this was essentially an action in quantum meruit,

3

whose source is state law, not federal law.

A similar result was reached in State of New York v. White, 528 F.2d 336; (2nd. Cir. 1975). In White, a group of Mohawk Indians had expressly rejected a 1798 treaty which ceded certain Mohawk holdings to New York State, and had siezed and occupied several hundred acres of land in Upstate New York. New York State brought a federal action to regain possession of the land, which it had acquired by deed in 1973. It included in its suit a cause of action to quiet title to the property, allegedly necessitated by the rejection of the 1798 treaty. Federal jurisdiction was asserted on the basis of a construction of this treaty.

The District Court below had dismissed the action for lack of subject matter jurisdiction. It construed the state's claim as essentially one for ejectment, which required only a showing of the State's right to possession pursuant to the 1973 deed. The references in the complaint to the 1798 treaty were found to be unnecessary surplusage.

3
See Also McFadden Express, Inc. v. Adley Corporation, 363 F2d. 546 (2nd Cir. 1966), wherein the Court upheld the District Court's dismissal for want of federal jurisdiction, finding that no private right of action existed for a violation of Section 5(4) of the Interstate Commerce Act. The Court also found that a determination of an alleged breach of a management contract between the parties would apparently not require a construction of the Interstate Commerce Act.

The Second Circuit expressly approved the lower court's rationale, and affirmed the dismissal, stating that:

"Federal question jurisdiction may be properly invoked only if the plaintiff's complaint necessarily draws into question the interpretation or application of federal law." Id. at 338.

In the instant case, Appellants' action is one for medical malpractice, whose source is state law - not federal law. The mere inclusion of a reference to a federal administrative regulation which has no application to a determination of malpractice cannot alter that effect and provide a basis for federal jurisdiction.

The Appellants herein have an appropriate forum for their action in state court, and every opportunity to pursue that course if they so desire.

CONCLUSION

The District Court's dismissal of this action was correct because no basis for federal subject matter jurisdiction exists. Judgment in behalf of the Appellee should be affirmed.

Respectfully submitted,

MARTIN, GANOTIS, AMSLER & BROWN
Attorneys for Defendant-Appellee
Office & P.O. Address
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN L. GRADY & FATIMA GRADY,
Plaintiffs-Appellants

vs.

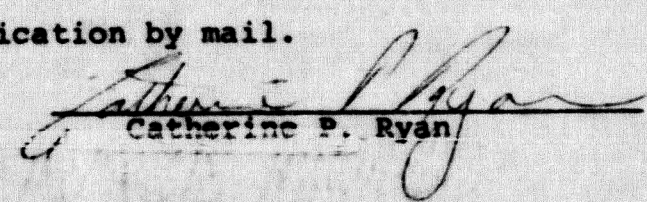
DR. RODERICK A. MCLEAN,
Defendant-Appellee

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

Catherine P. Ryan, being duly sworn, deposes and says that she is a clerk in the office of Martin, Ganotis, Amsler & Brown, the attorneys for the defendant-appellee herein. That on the 29th day of July, 1976, she served two (2) copies of the defendant-appellee's brief upon John L. Grady, representative for the plaintiffs-appellants by depositing a true copy of the same securely enclosed in a post-paid wrapper in an Official Depository maintained and exclusively controlled by the United States at 499 South Warren Street, Syracuse, New York, directed to said plaintiffs-appellants' representative at 141 Bishop Avenue, Syracuse, New York, that being the address within the State designated by him for that purpose upon the preceding papers in this action, or the place where he then kept an office between which places there then was and now is a regular communication by mail.

Sworn to before me this
29th day of July, 1976.


Notary Public


Catherine P. Ryan